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STATE OF WASHINGTON
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N°. **33607-3-II**
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

TERRY L. WILLIAMS and JANIS E. WILLIAMS, husband and wife,
Respondents,

v.

ATHLETIC FIELD, INC.,
Appellant.

BRIEF OF RESPONDENTS

Appeal from the Superior Court of Pierce County,
Cause No. 05-2-08858-9

ORIGINAL

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Through their undersigned attorney, Respondents Terry L. and Janis E. Williams hereby respond to the Brief of Appellant Athletic Field, Inc. ("AFI").

I. *ASSIGNMENTS OF ERROR*

Respondents assign no errors to the trial court's decision.

II. *ISSUES PERTAINING TO ASSIGNMENTS OF ERROR*

No issues exist because no errors were committed.

III. *STATEMENT OF THE CASE*

•Factual Background

Respondents Williams are the owners of the property at 1723 West Valley Highway in Sumner, Washington, against which Appellant AFI filed the subject lien. CP 14. Respondents Williams contracted with PowerCo, owned by Norman Hubbard, as general contractor for the construction project on the named property. *Id.;* CP 4. Respondents Williams entered into an agreement with AFI to do some of the work on the property, including grading, construction of walls, drainage, sewer, waterline installation and flat concrete work such as sidewalks and parking preparation. CP 4, 15.

Petitioner AFI commenced work on the project site in May 2004, receiving a significant payment in June 2004. CP 75.

Respondents Williams cancelled the contract with AFI in early December 2004 for several reasons, including work proceeding very slowly, resulting in increased costs for storage and rescheduling due to the delay. CP 15, 19.

Respondents Williams had a construction loan through Valley Bank in the amount of $1,000,000 (CP 115), from which funds could be drawn. CP 75. Once a request for funds was received by the Bank, it sent an inspector to determine whether the work to be paid for had been completed prior to releasing the funds. *Id.*

At the end of 2004, the Bank estimated that 50% of the project was completed and the loan balance was $498,819.00 (based upon what an inspector saw). CP 115. At the time of the hearing on the Motion for Order to Show Cause (June 15, 2005), the Bank estimated that 90% of the project was completed and the loan balance was $682,718.00. *Id.* The Bank froze part of the loan in the amount $317,282.00 due to AFI's claim of lien, and Respondents Williams had to seek alternative funding sources in order to complete their project. *Id.*

Respondents Williams paid AFI over $155,000.00. CP 15. This amount reflects more than what AFI earned from the work it

actually performed on the subject property. *Id.* AFI only completed 25%-30% of the work for the project. CP 387-88; CP 118-119; CP 90. Additionally, Petitioner AFI failed to pay Respondent for materials delivered to the job site. CP 15. Nevertheless, AFI filed its claim of lien for $276,825.00 plus interest. CP 13. The Claim of Lien was purportedly signed by a person named "Rebecca Southern", an employee of LienData USA, Inc., a "lien service" company. CP 8.

•Procedural Background

The Williams filed a Motion for Order to Show Cause re: Removal of Frivolous Lien on June 15, 2005. CP 1. The Court Commissioner considered "all initial pleadings, responsive pleadings and reply pleadings[.]" CP 135. An Order releasing AFI's lien was entered on June 27, 2005. CP 136. The Court Commissioner entered findings of fact and conclusions of law. CP 136-137.

AFI filed its Motion for Revision of Commissioner's ruling on July 7, 2005, along with supporting declarations containing new evidence. CP 140. The supporting declarations were stricken by the superior court judge. CP 410; CP 380-85; CP 410-411.

The Order on Plaintiffs Motion for Revision of Court Commissioner's Order and Revised Findings of Facts and Conclusions of Law was entered in favor of Respondents Williams on July 15, 2005. CP 406-409.

AFI filed its Notice of Appeal on July 28, 2005. CP 414-418.

IV. ARGUMENT

A. Issues raised by Appellant and Standards of Review

Once the superior court makes a decision on revision, the appeal is from the superior court's decision, not the commissioner's. *State v. Wicker,* 105 Wn. App. 428, 432-433, 20 P.3d 1007 (2001).

AFI has assigned error to Revised Findings of Fact and Conclusions of Law 2, 3, 4, and 5. The superior court's factual findings are reviewed "to determine whether the factual determinations are supported by substantial evidence." *W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.,* 85 Wn. App. 744, 750, 934 P.2d 722 (1997).

Revised Finding of Fact 2, that AFI's lien was "not signed, under penalty of perjury, by the claimant (or an officer of the

Claimant corporation) or by an attorney for the Claimant, in violation of RCW 60.04.091," required the trial court to interpret that statute. "The interpretation and construction of a statute is a question of law to be reviewed de novo." *Lumberman's of Washington, Inc. v. Barnhardt,* 89 Wn. App. 283, 286, 949 P.2d 382 (1997) (citing *W.R.P.,* 85 Wn. App. at 749, 934 P.2d 722). In conducting such a review, this Court "must construe a statute according to its plain language, and statutory construction is unnecessary and improper when the wording of a statute is unambiguous." *Id.,* citing *W.R.P.,* 85 Wn. App. at 749, 934 P.2d 722; *State v. Prada,* 75 Wn. App. 224, 230, 877 P.2d 231 (1994).

AFI asserts that the trial court erred in considering reply declarations filed by Respondents on their motion to release lien and in striking declarations filed by AFI in support of its motion for revision. This Court reviews "a trial court's decision to admit or to exclude evidence for abuse of discretion." *State v. Mercer-Drummer,* 128 Wn. App. 625, 629, 116 P.3d 454, 457 (2005). "An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner that is manifestly unreasonable." *State v. Zunker,* 112 Wn. App. 130, 140,

48 P.3d 344 (2002), *review denied,* 148 Wn.2d 1012, 62 P.3d 890 (2003).

Finally, AFI asserts that the trial court erred in awarding attorney's fees and costs to Respondents Williams instead of to AFI, pursuant to RCW 60.04.081. An award of attorney's fees and costs to the prevailing party is mandatory under the statute. RCW 60.04.081(4) ("the court **shall** issue an order . . . awarding costs and reasonable attorneys' fees . . . .") (emphasis added).

B. The trial court correctly interpreted RCW 60.04.091(2) and correctly ruled that AFI's claim of lien was invalid and unenforceable.

Revised Finding of Fact and Conclusions of Law number two states:

> That the Lien filed and recorded for the Defendant by LienDATA, USA[,] a "lien filing service," was not signed, under penalty of perjury, by the Claimant (or an officer of the Claimant corporation) or by an attorney for the Claimant, in violation of RCW 60.04.091.

CP 408.

RCW 60.04.091(2) states, in pertinent part, that a notice of claim of lien

> Shall be signed by the claimant or some person authorized to act on his or her behalf who shall

> affirmatively state that they have read the notice of claim of lien and believe the notice of claim of lien to be true and correct under penalty of perjury, and shall be acknowledged pursuant to chapter 64.08 RCW.

In this case, the named claimant on the Lien Claim is "Athletic Fields, Inc." CP 12-13. The form of acknowledgement required for a corporation is set out in RCW 64.08.070:

> On this ___ day of ___, 19__, before me personally appeared _____, to me known to be the (president, vice president, secretary, treasurer, or other authorized officer or agent, as the case may be) of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.
>
> In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written. (Signature and title of officer with place of residence of notary public.)

The trial court's Revised Finding of Fact and Conclusion of Law number 2 required it to interpret RCW 60.04.091.

In this case, the Claim of Lien was signed not by Craig Starren, president of AFI (CP 52), the named corporate lien claimant, nor by any other corporate officer or other authorized officer or agent of the corporation, but by one Rebecca Southern,

"an employee of LienData USA, Inc." CP 57. It is undisputed that Ms. Southern is neither the claimant nor the attorney of AFI.

Mr. Starren signed a Declaration that includes the following statement:

> My wife and I spoke with the company that filed the lien for AFI. We described the work that had been done and the basis for calculation of the amount of the lien. We authorized and instructed employees of LienData USA, Inc., to file the lien in the amount of $276,825.00 which is the reasonable amount of the unpaid balance for the work performed by AFI.

CP 55.

AFI argues that Rebecca Southern was "some person authorized to act" on his behalf by Mr. Starren, thus complying with the requirement of RCW 64.04.091(2), i.e., that the claimant or "some person authorized to act on his . . . behalf" must sign the notice of claim of lien. AFI then argues that "[t]he statute does not state that only the claimant or an attorney can sign a claim of lien, it expressly authorizes signature by an authorized person," adding, "[t]he proposed form is not mandatory, only adequate." Brief of Appellant, page 11.

1. AFI mischaracterizes the statutory lien form as a "sample form" which is not a part of the statute itself.

It must first be pointed out that the lien form set out in RCW 64.04.091(2) is much more than merely a "sample form," as it is characterized by AFI at page 11 of its Brief. The form is, in fact, part of RCW 64.04.091(2). *See Lumberman's,* 89 Wn. App. at 288, 949 P.2d 382 (quoting the attestation clause of the statutory lien form and citing it "RCW 60.04.091(2)").

AFI's mischaracterization of the statutory lien claim form as something separate and apart from the statute itself is the basis for its argument that "[i]f the statute and the form were in actual conflict, the statute would have to govern . . . ." Brief of Appellant, page 12. The statutory lien claim form and the statute are not in "actual conflict," because the lien form is part of the statute.

2. Language may not be "read in" to RCW 60.04.091, because the statute is not ambiguous.

When a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. *State v. Keller,* 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. denied,* 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). AFI does not suggest that RCW 60.04.091 is ambiguous, nor has any Washington Court so held.

A court "may not read into a statute language which does not appear when the statute is clear and unambiguous." *St. Paul & Tacoma Lumber Co. v. State,* 57 Wn.2d 807, 810, 360 P.2d 142 (1961). Nevertheless, AFI invites this Court to do precisely that when it argues that "[t]he language in the attestation clause only describes **some** of the persons who could sign the lien, a claimant, an attorney, or the agent of an employee benefit plan." Brief of Appellant, page 11 (emphasis added).

AFI asserts that the statute "does not state that **only** the claimant or an attorney can sign a claim of lien." *Id.* (emphasis added). AFI argues that the language, "a Claim of Lien substantially in the following form shall be sufficient," authorizes persons not named in the statutory form to verify the claim of lien. *Id.* at pages 11-12. No language in RCW 60.04.091 suggests that any person except those named in the statute can sign the verification of the claim of lien.

AFI's interpretation of RCW 60.04.091 would require the court to read into the statute language which does not appear, which a Court will not do when interpreting an unambiguous statute. Because RCW 60.04.091 is not ambiguous, this Court must be guided by its plain language, and should affirm the trial

court's interpretation. Ms. Southern was not the claimant or the claimant's attorney and thus was not authorized under RCW 60.04.091 to sign the verification of the lien claim, rendering it invalid.

3. AFI's arguments cannot be reconciled with principles of statutory interpretation.

AFI's argument cannot be reconciled with fundamental principles of statutory interpretation. First, "[i]n order to interpret a statute, each of its provisions 'should be read in relation to the other provisions, and the statute should be construed as a whole.'" *In re Detention of Williams,* 147 Wn.2d 476, 490, 55 P.3d 597 (2002) (quoting *Weyerhaeuser Co. v. Tri,* 117 Wn.2d 128, 133, 814 P.2d 629 (1991) (citing *State v. Sommerville,* 111 Wn.2d 524, 531, 760 P.2d 932 (1988))). As discussed above, the statutory lien form is, in fact, a part of RCW 60.04.091(2).

Reading one provision from RCW 60.04.091(2), "shall be signed by the claimant or some person authorized to act on his or her behalf," in relation to the language of the verification clause, "I am the claimant (or attorney of the claimant, or administrator, representative, or agent of the trustees of an employee benefit plan)," and reading the statute "as a whole" yields the following

result: "some person authorized" to act on behalf of the claimant refers **only** to the claimant's attorney or an administrator, representative or agent of the trustees of an employee benefit plan. Since AFI is not an employee benefit plan, the only person "authorized" to verify the claim of lien, other than Mr. Starren or another corporate officer of AFI, was AFI's attorney.

There is no "conflict" between "the form" and "the statute," as suggested by AFI at page 12 of its Brief. Nor is it permissible to "read in" language that does not appear in the statute, as AFI urges the Court to do. If the Legislature had intended that **any** person authorized by a lien claimant could verify the lien claim, it would have written the statute to read, "I am the claimant (or ***agent*** of the claimant . . . ."). The Legislature chose, instead, the language that appears in the statute: "I am the claimant (or ***attorney*** of the claimant. . . .").

4. Even if RCW 60.04.091 is rendered ambiguous by the language stating "a claim of lien substantially in the following form shall be sufficient," AFI's argument cannot be reconciled with principles of statutory construction.

If this Court determines that RCW 60.04.091 is ambiguous, it will then turn to the principles of statutory construction. *See*

Kinnebrew v. CM Trucking & Const., Inc., 102 Wn. App. 226, 231, 6 P.3d 1235 (2000) (citing *Lumberman's,* 89 Wn. App. at 286, 949 P.2d 382) ("Appellate courts should construe a statute according to its plain language, and where a statute is unambiguous, statutory construction is improper.")

AFI's argument that "[t]he language in the attestation clause only describes **some** of the persons who could sign the lien, a claimant, an attorney, or the agent of an employee benefit plan" (Brief of Appellant, page 11) (emphasis added) is contrary to the canon of statutory construction of *expressio unius est exclusio alterius,* which means "to express one thing in a statute implies the exclusion of the other." *Williams,* 147 Wn.2d at 491, 55 P.3d 597.

A court construing RCW 60.04.091(2) will presume that the failure to identify **any** agent of the claimant as a person who can sign the claim of lien was the intentional act of the Legislature. *See State v. Delgado,* 148 Wn.2d 723, 729, 63 P.3d 792 (2003). AFI's assertion that the list of persons authorized to sign the verification of a claim of lien is "non-exclusive" (Brief of Appellant, page 12) is antithetical to the canon of *expressio unius est exclusio alterius.*

Either by the plain language of RCW 60.04.091(2) or by principles of statutory construction, the superior court correctly

ruled that AFI's claim of lien was invalid because it was not signed by an officer of AFI or by AFI's attorney. This Court should affirm that ruling.

5. The cases cited by AFI do not support its position.

AFI cites *Strandell v. Moran,* 49 Wn. 533, 95 Pac. 1106 (1908) and *Fircrest Supply, Inc. vs. Plummer,* 30 Wn. App. 384, 634 P.2d 891 (1981) to support its argument that, contrary to the plain language of RCW 60.04.091(2), someone besides a claimant or a claimant's attorney can verify a claim of lien. These cases were decided under statutes that have long been repealed: they do not govern claims of lien filed under the current RCW 60.04.091.

In *Strandell,* the lien claimant (Freda Strandell) did business as "A. Strandell, agent" through an agent named Andrew Strandell. Mr. Strandell signed the notice of lien claim. *Strandell,* 49 Wn. at 536, 95 P. 1106. The only language quoted from the statute upon which the *Strandell* decision is based is as follows: "[t]he statute provides that the notice required to be given the board with whom the bond is filed 'shall be signed by the person or corporation making the claim or giving the notice." *Strandell,* 49 Wn. App. at 535. Because neither the city officers nor the bondsmen were

misled about the identity of the lien claimant by the signature of Andrew Strandell, the Court ruled that the notice was "sufficient to comply with the statute." *Strandell,* 49 Wn. at 536, 95 P. 1106.

Strandell was decided almost 100 years ago: the law has changed considerably during the intervening years. As this Court explained in *Lumberman's,* "In 1991 and 1992, the Legislature broadened the significance of the verification statement when it required in RCW 60.04.091 that the **claimant** swear under penalty of perjury that the claim of lien is true and correct." *Lumberman's,* 89 Wn. App. at 287-288, 949 P.2d 382 (emphasis added). Unlike the statute quoted in *Strandell,* RCW 60.04.091

> requires that a lien claimant sign the notice of lien claim. RCW 60.04.091. The claimant must **also** affirmatively state that he has read the lien and believes it is correct under penalty of perjury. RCW 60.04.091(2).

Flag Const. Co., Inc. v. Olympic Blvd. Partners, 109 Wn. App. 286, 288, 34 P.3d 1250 (2001) (emphasis added).

Strandell cannot support AFI's argument because it was decided under a different statute that did not include the requirements of RCW 60.04.091 as it presently appears.

The statute upon which the *Fircrest* decision was based was repealed in 1992. *See* Laws 1991, ch. 281, § 31. Further, as this

Court noted in *Flag Construction,* the notary public in *Fircrest* "stated that the lien claimant had signed and sworn to the contents of the lien before her. The court held that the verification was sufficient because it 'clearly [identified] him as the claimant who was sworn.'" *Flag Construction,* 109 Wn. App. at 290, 34 P.3d 1250, quoting *Fircrest,* 30 Wn. App. at 390, 634 P.2d 891.

In this case, Ms. Southern signed the verification, thereby falsely swearing that she was "the claimant (or attorney of the claimant . . . ."), and the notary's acknowledgement does not identify AFI as the "claimant who was sworn." *Fircrest* was decided under a different statute, and is easily distinguishable on its facts from the instant case.

In both *Lumberman's* and in *Flag Construction,* the court held that failure of the lien claimant to sign the verification as the statute requires does not "substantially comply with the lien claims' statute." *See Flag Construction,* 109 Wn. App. at 289-290, 34 P.3d 1250; *Lumberman's,* 89 Wn. App. at 289, 949 P.2d 382 (1997) (where claimant did not sign the verification, claimant was "not in substantial compliance" with the statute; and the claim of lien filed was declared to be "invalid and unenforceable"). The trial court correctly ruled that the claim of lien signed by an employee of

LienData, USA was invalid because it was not verified by the claimant or the claimant's attorney.

C. The trial court correctly found that the lien claim was frivolous.

RCW 60.04.081(4) provides:

> If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court shall issue an order releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, and awarding costs and reasonable attorneys' fees to the applicant to be paid by the lien claimant. If the court determines that the lien is not frivolous and was made with reasonable cause, and is not clearly excessive, the court shall issue an order so stating and awarding costs and reasonable attorneys' fees to the lien claimant to be paid by the applicant.

Although not required to do so (*W.R.P. Lake Union Ltd. Partnership v. Exterior Services, Inc.,* 85 Wn. App. 744, 750, 934 P.2d 722 (1997)), the superior court entered Revised Findings of Fact and Conclusions of Law, including the following: that the Respondents met their initial burden of proof of providing facts which supported the contention that the lien was frivolous and without reasonable cause; that AFI failed to meet its burden of proof by making a prima facie case that the lien was valid, not frivolous, and was based on reasonable cause; that AFI's lien was invalid, frivolous, and without reasonable cause; and that Mr. and

Mrs. Williams incurred costs in the amount of $399.81 and reasonable attorney's fees in the amount of $9,900 "in seeking the removal of the [Appellant's] frivolous and/or invalid and/or excessive lien. . . ." CP 407.

"[F]or a lien to be frivolous, the decision that the lien was improperly filed must be clear and beyond legitimate dispute." *W.R.P.,* 85 Wn. App. at 752, 934 P.2d 722. In *W.R.P.,* Division One of the Court of Appeals reversed the trial court's release of lien and award of attorney's fees because the lien presented "debatable issues of law and fact." *Id.*

The "debatable issues" in *W.R.P.* precluded a summary release of the lien: "[w]hen **legitimate** disputes arise regarding whether the lien has been properly filed, trial courts should not rule that the lien is per se frivolous or filed without just cause." *W.R.P.,* 85 Wn. App. at 753, 934 P.2d 722 (emphasis added).

However, where, as in this case, the facts clearly indicate the lien is frivolous and without reasonable cause or excessive, the court is authorized to "determine that the lien is frivolous and made without reasonable cause, or clearly excessive," release the lien, and award costs and reasonable attorneys' fees to the applicant. RCW 60.04.081(4).

AFI appears to argue that simply because facts stated by Mr. Williams and Mr. Hubbard in their Declarations to support release of the lien were "contested" by Mr. Starren in his Declaration, there were *ipso facto* "legitimate disputes" about whether AFI's lien was properly filed. *See* Brief of Appellant, pages 18-19.

However, "[r]aising a material fact alone will not prevent the lien from being released." Kelly Kunsch, 1A WASHINGTON PRACTICE: *Methods of Practice* (4th ed., 1997 with 2005 Pocket Parts), § 53.21, page 2342. *See also W.R.P.,* 85 Wn. App. at 749-750, 934 P.2d 722 ("Exterior . . . argues that if the lienor raises a material issue of fact, the lien cannot be released. We disagree."). Simply because Mr. Starren "contested" facts stated by Mr. Williams and Mr. Hubbard did not preclude the trial court from releasing the lien in the summary proceeding.

Most fundamentally, "[o]ne claiming a lien has the burden of proving the right to it." *Pacific Gamble Robinson Co. v. Chef-Reddy Foods Corp.,* 42 Wn. App. 195, 198-199, 710 P.2d 804 (1985), *review denied,* 105 Wn.2d 1008 (1986). The evidence presented by AFI failed to establish that AFI had a right to a lien, as Judge Steiner found "[t]hat the Defendant failed to meet its burden of proof

in failing to provide a prima facie case that the lien was valid, not frivolous and based on reasonable cause." CP 408.

One who renders services and is paid in full (and in this case, overpaid) has no right to file a claim of lien. Under RCW 60.04.021, a lien is authorized only for "the contract price" of the services rendered. AFI itself acknowledges this principle: "AFI . . . was entitled to file a lien to secure **any amounts owing**." Brief of Appellant, page 19 (emphasis added).

Norman Hubbard, general contractor on the Williams' project, stated in his Declaration that AFI agreed to "do a certain amount of the work on the construction site," described by Mr. Hubbard as "limited," which work was set out in detail in attachments to his Declaration. *See* CP 4. AFI was paid in full (and in fact "overpaid") for the work it completed before it filed the lien. There were no "amounts owing," and AFI was not "entitled to file a lien." Mr. Hubbard stated in his Declaration:

> Mr. Starren and Athletic Fields, Inc. performed only a limited amount of the work (an amount substantially less than one-third of the total work that was originally contemplated for the site, per the Cost Breakdown). The property owner, Mr. Williams, (again, whom I had been working with for over a year and a half before AFI began work on the site) has paid AFI, to date, over $155,000.00

> . . . By my calculations, (having been the one who originally estimated this job and put together the figures to determine a price for a proposal to Mr. Williams for this work), AFI should have been paid the sum of only about $120,000(?) for the actual work performed, including their ten (10%) percent profit and plus 8.8% Washington State sales tax.
>
> It appears clear to me that what Mr. Starren has done is taken an original "Cost Breakdown" sheet which I had originally prepared for Terry Williams . . . (see Exhibit No. 1 to the Declaration of Terry L. Williams), subtracted from the gross bottom-line figure of Exhibit No. 1 the amount that he had been paid ($155,000.00) and came up with a subtotal. To this subtotal ($264,825.00), it appears that he likely added some of his costs for bonding on the job, which I estimated to be somewhere in the neighborhood of $12,000, leaving the balance of $276,825.00, which is, coincidentally, the amount of the lien that AFI has placed against the Williams project.

CP 5-6.

As authorized by RCW 60.04.081, the Commissioner resolved the factual disputes during the summary proceeding. *W.R.P.,* 85 Wn. App. at 750, 934 P.2d 722 ("the Legislature intended to allow a resolution of factual disputes in this summary proceeding"). Even if there were "factual disputes" between the parties, the superior court's finding that the lien was frivolous was not precluded thereby, and further, the superior court's findings are supported by substantial evidence in the record.

The lien was frivolous because AFI had no right to file the claim. AFI was paid in full (and even overpaid) for the work it completed on the Williams' project before it filed the lien. This Court should affirm the trial court's ruling.

D. The trial court correctly found that the lien claim was clearly excessive.

An error in the amount claimed in a materialman's lien will invalidate the lien if "it is made with an intent to defraud or in bad faith." *CHG Intern., Inc. v. Platt Elec. Supply,* 23 Wn.App. 424, 426, 597 P.2d 412, *review denied,* 92 Wn.2d 1026 (1979). "To constitute bad faith, the overcharge must be knowingly made." *Id.* An overcharge is evidence of bad faith. *Id.*

The Court Commissioner had before him the "Cost Breakdown" of work "that AFI had the option . . . to perform." CP 15. The Cost Breakdown was prepared by Norman Hubbard. *Id.* Mr. Williams stated that he had paid "over $155,000 (directly or through Mr. Hubbard and his company, PowerCo), to Mr. Starren and his company, AFI." *Id.* Mr. Williams stated that "after closely evaluating the extent of work actually completed by AFI, we have overpaid AFI tens of thousands of dollars." *Id.*

Mr. Hubbard, general contractor on the Williams' project, stated that AFI contracted to do only certain "limited" work "and to submit periodic statements for payment." CP 4. Mr. Hubbard also stated that AFI "performed only a limited amount of the work (an amount substantially less than one-third of the total work that was originally contemplated for the site, per the Cost Breakdown)." CP 5. Mr. Hubbard calculated that AFI "should have been paid the sum of only about $120,000(?) for the actual work performed." *Id.*

If AFI had merely stated an incorrect amount on its claim of lien, its assertion that "the amount itself does not make the lien excessive" might be true. However, whatever the amount, a claim of lien must be made in good faith. *CHG Intern., Inc. v. Platt Elec. Supply,* 23 Wn. App. 425, 426, 597 P.2d 412 (1979). Overcharging an amount on a claim of lien is evidence of bad faith. The record shows that any amount whatsoever claimed by AFI would have constituted an "overcharge." There was additional evidence of bad faith before the trial court. Mr. Hubbard stated:

> It appears clear to me that what Mr. Starren has done is taken an original "Cost Breakdown sheet which I had originally prepared for Terry Williams, . . . subtracted from the gross bottom-line figure . . . the amount that he had been paid ($155,000.00) and come up with a subtotal. To this subtotal ($264.825.00), it appears that he likely added some of

> his costs for bonding on the job, which I estimated to be somewhere in the neighborhood of $12,000.00, leaving the balance of $276,825.00, which is, coincidentally, the amount of the lien that AFI has placed against the Williams project.

CP 5-6.

AFI knowingly stated an overcharge on the claim of lien: the claimed amount added to what AFI had already been paid would have constituted full payment for completion of all of the work listed on the Cost Breakdown prepared by Norman Hubbard. *See* CP 20. As Mr. Hubbard stated, AFI completed less than one third of that work and was overpaid for what work it did complete. Mr. Hubbard presented spreadsheets showing the work completed and not completed by AFI. *See* CP 10-11.

AFI knew, as well as Mr. Hubbard knew, that AFI had not completed all of the work described on the Cost Breakdown and that it was not entitled to the full amount of payments for all of the projected work. AFI engaged in "obvious misuse" of the lien statute. *CHG Intern., Inc. v. Platt Elec. Supply,* 23 Wn. App. 425, 427, 597 P.2d 412 (1979).

This case is nothing at all like the cases cited by AFI. Unlike in *CHG Intern., Inc.,* here there was no "[o]ther evidence . . . adduced . . . inconsistent with bad faith, which explained the

overcharge." *Id.* Even though AFI filed its lien claim in December of 2004 and had over six months to gather and produce evidence, it provided no documentation to justify its claim of lien.

In *Pacific Industries, Inc. v. Singh,* 120 Wn. App. 1, 86 P.3d 778 (2003), the Court ruled that a lien was not excessive where it was based on the claimant's estimates of the profits from the project, and it took six months to confirm the actual profits, "suggesting the amount was difficult to determine." *Pacific Industries, Inc.,* 120 Wn. App. at 10-11, 86 P.3d 778. Here, AFI's lien was not based on estimates of profits from the project, but was allegedly for work AFI had completed. The evidence established that AFI did not come near to completing "90%" of the work on the Cost Breakdown.

There was no "**legitimate** dispute" about the amount of work AFI actually completed: it was carefully laid out on Mr. Hubbard's spreadsheets in the original Declaration Mr. Hubbard signed, which was filed on June 15, 2005 and served upon AFI on June 16, 2005 (CP 51), which evidence was uncontroverted by AFI. Mr. Starren's bald and conclusory assertion that AFI had completed "90%" of the work on the Cost Breakdown was refuted by Mr. Hubbard in his

reply Declaration. *See* CP 89-92. In response to the 90% claim, Mr. Hubbard stated:

> Mr. Starren had completed only 25% to 30% called out for in the original "Cost Breakdown" . . . . The site preparation was not completed. The preparation work for the building was not completed. (See Exhibit No. 4 to my original Declaration, which breaks down, line item by line item, just what Materials, Labor & Equipment costs were credited to AFI (based on invoices and time records that I have secured copies of (over the past few months) from the material suppliers and on-the-job personnel. Upon a close scrutinized accounting, AFI was "overpaid by approximately $43,700.00 (inclusive of credit to me and my company for equipment and profit, both of which I should have received).

CP 90.

The trial court correctly resolved the factual dispute between the parties by finding that AFI's lien was clearly excessive, which finding is supported by substantial evidence in the record. Because the overcharge was knowingly made by AFI, and because AFI was owed no money by the Respondents, filing of the lien was a clear abuse of the statute and the lien was filed in bad faith. In this case, the proper remedy was not reduction of the lien, but release of the lien, which the trial court correctly ordered.

E. AFI was not denied due process because the court considered the Respondents' reply Declarations and refused to consider new evidence on AFI's motion for revision.

As stated by AFI itself, "basic procedural due process requires notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding," and notice must be "received in adequate time to prevent surprise, helplessness, and disadvantage." Brief of Appellant, page 28. AFI received notice in adequate time to prevent surprise and had an opportunity to be heard by the court. In fact, AFI had more time than they were entitled to under RCW 60.04.081 to prepare and respond because Respondents agreed to continue the show cause hearing to accommodate AFI's attorney's schedule from June 23, 2005 to June 27, 2005. CP 60-61.

RCW 60.04.081 sets out the procedure for release of a frivolous lien. First, the owner of real property subject to a claim of lien who believes the claim of lien to be frivolous and made without reasonable cause or clearly excessive may "apply by motion to the superior court. . . for an order directing the lien claimant to appear . . . and show cause . . . why the relief requested should not be granted." RCW 60.04.081(1).

The motion must state the grounds upon which relief is asked, and "shall be supported by the affidavit of the applicant or

his or her attorney setting forth a concise statement of the facts upon which the motion is based." *Id.*

The lien claimant must then appear before the court no earlier than six nor later than fifteen days from service of the motion to show cause, "if any he or she has, why the relief requested should not be granted." RCW 60.04.081(1).

In this case, the statutory procedure was followed, and AFI had the opportunity to present all evidence in its possession to establish that its lien was not frivolous or clearly excessive. AFI chose to present nothing to the Court except the four-page Declaration of Craig Starren in Opposition to Motion to Remove Lien (CP 52-55) and the three-page Memorandum in Opposition to Motion to Remove Lien (CP 56-58).

The Williams (Respondents) then presented a reply memorandum supported by reply declarations, as is authorized by Pierce County Local Rule 7(a)(6). CP 64-73; CP 74-86; CP 87-106; CPP 107-112; CP 113-116; CP 117-120; CP 121-124; CP 125-132. There are no further responsive documents authorized by Pierce County Local Rules: in other words, no "response to a reply" is permitted. Even if the reply Declarations filed by

Respondents had been filed earlier[1], AFI was not entitled to file any other documents. Further, at or prior to the hearing on its Motion for Revision, AFI could have moved the superior court judge to NOT consider the reply memorandum and reply Declarations that had been filed by the Respondents herein, if AFI felt that it was not being given a "fair shake", but chose not to do so. AFI was not denied due process.

It is within the discretion of the trial court to admit or exclude evidence. *Int'l Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.,* 122 Wn. App. 736, 744, 87 P.3d 744, *review denied,* 153 Wn.2d 1016, 101 P.3d 109 (2004). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." *State v. Neal,* 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). It was not contrary to law for the Commissioner to consider the reply declarations which are specifically authorized by Pierce County Local Rules.[2] There was no abuse of discretion.

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[1] Although AFI states at page 28 of its Brief that the reply Declarations were "only submitted immediately prior to the hearing," AFI received the reply Declarations by email on June 25, 2005, two days before the hearing. CP 384.

[2] In fact, the Court Commissioner took a lengthy recess to review the Reply Memorandum and Declarations (and to give additional time to the Appellant's counsel to do the same and prepare to respond to them in his oral argument). Appellant's counsel did NOT request a continuance or seek additional time to review the pleadings officially "filed" on June 27, 2005 (though "E-filed" June 24, 2005), but chose instead to proceed

AFI also argues that on its motion for revision of the Court Commissioner's ruling, Judge Steiner erred in striking additional evidence consisting of "responsive declarations" to the reply Declarations submitted by Respondents.

Under RCW 2.24.250, which governs revision of a Court Commissioner's decision, a superior court judge is limited to "the records of the case, and the findings of fact and conclusions of law entered by the court commissioner . . . ."

This statute has been interpreted by the Supreme Court to mean that the superior court "reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues **presented to the commissioner**." *State v. Ramer,* 151 Wn.2d 106, 113, 86 P.3d 132 (2004) (emphasis added) (citing *In re Marriage of Moody,* 137 Wn. 2d 979, 993, 976 P.2d 1240 (1999). Judge Steiner correctly refused to consider new evidence presented with the motion for revision. *See Moody,* 137 Wn.2d at 993, 976 P.2d 1240 ("the superior court judge correctly refused to consider the new issues and new evidence offered on the motion for revision."). There was no error.

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with the hearing on that date. Further, as stated herein, AFI did NOT seek to have the Reply Memorandum and Declarations stricken or NOT considered by the superior court judge on its Motion for Revision, a procedural decision that AFI cannot NOW reverse.

F. The trial court correctly awarded attorney's fees to the Respondents.

RCW 60.04.081(4) provides:

> If, following a hearing on the matter, the court determines that the lien is frivolous and made without reasonable cause, or clearly excessive, the court **shall issue an order** releasing the lien if frivolous and made without reasonable cause, or reducing the lien if clearly excessive, **and awarding costs and reasonable attorneys' fees** to the applicant to be paid by the lien claimant. (Emphasis added.)

The Commissioner found, and the superior court Judge affirmed, that AFI's lien was frivolous and clearly excessive, and properly awarded attorney's fees to the Respondents.

G. The Respondents are entitled to attorney's fees incurred in defending this appeal.

RAP 18.1(a) provides that a party must request fees and expenses on review "if applicable law grants to a party the right to recover" them. Respondents Williams so request.

RCW 60.04.181(3) is the applicable law that grants a right to an award of attorneys' fees and necessary expenses incurred by the prevailing party in the court of appeals. *Lumberman's,* 89 Wn. App. at 292, 949 P.2d 382. *See also Kinnebrew v. CM Trucking & Const., Inc.*, 102 Wn. App. 226, 237, 6 P.3d 1235 (2000) (Court

agreed that attorney fees should be awarded on appeal pursuant to RCW 60.04.181 and RAP 18.1(a)).

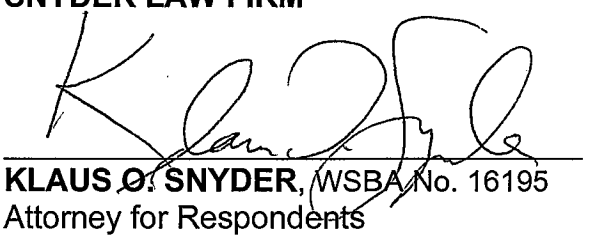
As prevailing parties in the superior court, Respondents were properly awarded their costs and attorney's fees pursuant to RCW 60.04.081(4). If Respondents successfully defend this appeal, they request that this Court award them their costs and attorneys' fees incurred in defending this appeal pursuant to RCW 60.04.181(3).

V. *CONCLUSION*

The trial court committed no error in finding that AFI's lien was frivolous and clearly excessive, in releasing the lien, or in awarding costs and attorneys' fees to the Respondents. This Court should affirm the decision and award Respondents their costs and attorneys' fees incurred in defending this appeal.

RESPECTFULLY SUBMITTED this **27th** day of **January, 2006.**

SNYDER LAW FIRM



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